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UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

IN RE APPLE IPHONE ANTITRUST
 LITIGATION

Case No. 4:11-cv-06714-YGR
 Case No. 4:19-cv-03074-YGR

**DEFENDANT APPLE INC.'S OPPOSITION
 TO PLAINTIFFS' ADMINISTRATIVE
 MOTION TO MODIFY CASE SCHEDULE**

Hon. Yvonne Gonzalez Rogers

DONALD R. CAMERON, *et al.*,

 Plaintiffs

 v.

 APPLE INC.,

 Defendant.

INTRODUCTION

A motion “seek[ing] to modify a pretrial scheduling order must be brought pursuant to Civil Local Rule 6-3,” not an “improper administrative motion.” *Silverman v. City & Cty. of San Francisco*, No. C 11-1615 SBA, 2012 WL 6019309, at *1 (N.D. Cal. Dec. 3, 2012). Moreover, class plaintiffs chose to file their administrative motion (and 564 pages of exhibits) on the evening of Monday, November 23—making Apple’s response due the day after Thanksgiving, despite the Court’s admonition that “[a] lawyer should not serve papers . . . at a time . . . designed to inconvenience an opponent,” N.D. Cal. Guidelines for Prof’l Conduct § 5(c). Class plaintiffs agreed to extend the response date by one business day after Apple raised this timing.

Procedural defects aside, the Court should reject class plaintiffs’ attempt to decouple the class cases from *Epic*—and deprive the Court of the class certification briefs it sought before the *Epic* trial. Their administrative motion raises the same two concerns they voiced at the October 19, 2020 case management conference, at which the Court indicated that it would not entertain an extension motion unless (a) Apple refused to coordinate on deposition scheduling, or (b) Magistrate Judge Hixson made a finding of discovery prejudice. Neither of those things has happened. The motion should be denied.

BACKGROUND

Months ago, the Court set a class certification schedule running from February to May 2021. Dkt. 209 at 4-5. Apple has undertaken extraordinary efforts to maintain that schedule, including by producing nearly 3.7 million documents by the end of July, the deadline Apple set for substantial completion. Dettmer Decl., Ex. A at 2. All parties have worked diligently and cooperatively, and until very recently no one raised any discovery issues with Magistrate Judge Hixson.

On October 6, 2020, the Court set *Epic v. Apple* for a bench trial on May 3, 2021, Dkt. 119 at 1-2, with interim deadlines designed to synchronize with the extant deadlines in the class cases. As the Court explained during the October 19 hearing: “[W]hen I put the [Epic] schedule in place, I had [the class] schedule in mind” to ensure that it would have “all of [the class certification] briefing . . . to understand the landscape” and “have the full scope of your class certifications in mind” before trial. Dkt. 159-25, Ex. 38 at 31:14-32:1. Accordingly, the Court said that no extension requests would be entertained unless Magistrate Judge Hixson found a party had been “prejudiced by some discovery

dispute.” *Id.* at 38:7-12. Nor did the Court “want a motion [for an extension]” based on deposition scheduling “until [it had] dueling lists of depositions,” and any scheduling issue arising out of a “failure to produce . . . documents” similarly had “to go in front of Judge Hixson first.” *Id.*

| Epic | Pepper/Cameron |
|---|---|
| | 1/4 - Case Management Statement Due |
| 1/6 - Deadline to complete document production | |
| | 1/11 - Case Management Conference |
| 1/22 - Deadline for joint Trial Elements, Legal Framework and Remedies submission | |
| | 2/3 - Deadline for Class Certification Motion and Supporting Expert Reports |
| 2/15 - Fact Discovery Cutoff & Expert Reports | |
| 3/1 - Case Management Conference | |
| 3/15 - Rebuttal Expert Reports | |
| 3/31 - Expert Discovery Cutoff | |
| 4/7 - Deadline for proposed Findings of Fact and Conclusions of Law | |
| 4/9 - Deadline for Joint Pretrial Conference Statement and file Motions in Limine | |
| 4/12 - Deadline to File Responses to Motions in Limine | 4/12 - Deadline for Class Certification Opposition and Expert Reports |
| 4/21 - Pretrial Conference | |
| 5/3 - Trial Begins | |

Following the October 19 hearing, the class plaintiffs sent a flurry of letters to Apple, demanding immediate responses to over 50 discovery-related issues. Dettmer Decl., Ex. A at 1. These included new demands for production and additional custodians—even though Apple had substantially completed discovery months earlier. *Id.* at 1-2. Apple nevertheless responded promptly to each inquiry in turn, and has produced more documents accordingly. *Id.* at 1-2. The two issues that class plaintiffs raise now were submitted to Magistrate Judge Hixson on November 13, 2020:

- First, plaintiffs seek allegedly missing “structured cost data” even though Apple has repeatedly explained that this data is not readily obtainable or, to the extent it is readily available, has already been produced. Dkt. 146-3 at 1, 4.
- Second, plaintiffs seek to compel immediate production of 65 billion transactional records. Dkt. 147-3 at 4. Yet any delay is the product of plaintiffs’ shifting demands; Apple has made clear that it stands ready to produce this data (but will do so only once given the burden). *Id.* at 4-5.

Judge Hixson has to date taken no action on these submissions.

In addition, the class plaintiffs have expressed concern that they will be unable to coordinate with Epic, requiring some Apple witnesses to be deposed twice—an issue the Court noted at the

1 October 19 CMC. Dkt. 159-25, Ex. 38 at 29:1-30:3, 35:10-19. Immediately after that hearing, counsel
2 for the Developer Plaintiffs emailed all counsel:

3 Essentially, we think if we identify approx. 5 deponents all parties will want to depose, or
4 more, we then ask Apple – today on a call if possible – if they want those deponents to be
5 deposed once or twice. If once, they have to agree to move the schedule, given when Epic will
6 be ready. If twice, then so be it and class plaintiffs will start depositions before Epic may be ready.

7 Dkt. 159-25, Ex. 40 at 4. Apple responded by *agreeing* that five Apple witnesses could be deposed
8 twice. Dkt. 159-25, Ex. 45 at 1. And Apple also said it would discuss extending the length of
9 depositions so long as the class plaintiffs and Epic coordinated about which witnesses needed such
10 special treatment. *Id.* The class plaintiffs have never provided a meaningful response to Apple’s
11 proposal. They instead have asked to depose two current Apple employees; Apple promptly provided
12 available dates for each, and class plaintiffs have confirmed both “[o]n behalf of” all plaintiffs. Dettmer
13 Decl. Ex. C; *accord* Dettmer Decl. Ex. D.

14 DISCUSSION

15 The Court devised a coordinated schedule to accommodate the overlapping demands of
16 *Cameron, Pepper*, and *Epic*. Apple is committed to meeting the deadlines in the current coordinated
17 schedule. Yet class plaintiffs now seek to de-coordinate these cases, depriving the Court of the class
18 certification briefing it sought in advance of the *Epic* trial. *See* Mot. at 1. While they assure the Court
19 that it “will still have the benefit of *Plaintiffs’* motions, supporting expert reports, and trial briefs,” *id.*
20 at 5 (emphasis added), the Court would not have the benefit of Apple’s responses or expert reports.
21 Thus, plaintiffs’ proposal would deny the Court a full map of these cases’ “landscape”—the reason
22 why the Court “put the schedule in place.” Dkt. 159-25, Ex. 38 at 31:14-18.

23 Class plaintiffs offer no cause to justify the disruption they seek. *See* Fed. R. Civ. P. 16. They
24 raise the same two concerns voiced at the October 19 CMC—deposition coordination and document
25 production—but have not heeded the Court’s guidance regarding either. *See* Dkt. 159-25, Ex. 38 at
26 39:7-12 (“I don’t want a motion until I have dueling lists of depositions, . . . and if you even mention
27 the failure to produce millions of documents, then that has to go in front of Judge Hixson first. So you
28 cannot bring that motion without having certainty on those two topics.”).

1. With respect to depositions, the thrust of the class plaintiffs’ motion is that Apple seeks “to
have its cake and eat it too” by refusing to coordinate depositions or agree to an extension. Mot. at 4.

1 But this Court has already ordered that “[w]itnesses should only be deposed once,” putting the burden
 2 of coordination on the plaintiffs. Moreover, in light of the Court’s admonition to avoid disrupting the
 3 schedule by coordinating depositions, Dkt. 159-25, Ex. 38 at 35:10-14, Apple has agreed to let plaintiffs
 4 identify, in advance, a reasonable number of witnesses who could be deposed twice. Dkt. 159-25, Ex.
 5 45 at 1. Apple has also indicated its willingness to adjust time limits, in advance, in appropriate
 6 circumstances. *Id.* Plaintiffs, not Apple, have refused to discuss any relevant compromise. *See id.*

7 Plaintiffs suggest they “have long planned to take depositions in November and December,”
 8 implying that Apple is somehow stopping them from doing so. Mot. at 3. To the contrary, before filing
 9 the instant motion class plaintiffs had identified only three deponents: Messrs. Okamoto, Fischer, and
 10 Shoemaker. Apple promptly provided available dates for the first two, who are current Apple
 11 employees, and informed plaintiffs that they would have to subpoena the third, who is a former
 12 employee. Dettmer Decl. ¶ 2. Critically, there are no conflicts regarding “dual depositions” at this
 13 time, *id.* ¶ 3, as class plaintiffs have agreed to coordinate with Epic for the Okamoto and Fischer
 14 depositions. Dettmer Decl. Exs. C & D. Apple has also offered to find new dates if the supplemental
 15 “productions for Mr. Okamoto” would “inhibit[] [their] deposition preparation.” Mot. at 4; *see also*
 16 Dettmer Decl. Ex. E; Dkt. 159-25, Ex. 45 at 2.

17 Apple has thus continued to coordinate with plaintiffs since the October 19 CMC. A month
 18 has now passed, and no deposition conflicts have arisen; thus, it is altogether unclear why Plaintiffs
 19 rushed to court just before Thanksgiving to grieve an “impossible position,” Mot. at 5, that is purely
 20 hypothetical—particularly given that the Court did not “want a motion until I have dueling lists of
 21 depositions” and “certainty” on an actual dispute. Dkt. 159-25, Ex. 38 at 39:7-12.

22 2. Plaintiffs also blame Apple for supposed delays in document productions. Mot. at 5. Again,
 23 they ignore the Court’s clear statement that a motion premised on discovery prejudice would “have to
 24 wait to see what Judge Hixson says on that topic.” Dkt. 159-25, Ex. 38 at 32:8-9. The forthcoming
 25 rulings could moot this motion: There will be no basis to revisit the schedule if Judge Hixson rejects
 26 plaintiffs’ positions or articulates a solution to the disputes that does not affect the schedule. Moreover,
 27 Apple already told the class plaintiffs it is willing to meet and confer if Judge Hixson’s resolution of
 28 either or both disputes *does* seem likely to impact the schedule. *See* Dettmer Decl. Ex. B.

1 In any event, class plaintiffs fail to substantiate their bare assertion of prejudice. That Apple
 2 has continued to produce documents since July 31, Mot. at 2, is no surprise given that “substantial
 3 completion” is not “total completion.” Indeed, class plaintiffs have continued to propound new
 4 requests and demand more productions. Dettmer Decl. Ex. A at 2-4. And while they misleadingly
 5 note that Apple “produced 2.3 million pages of critical documents” since July 31, Mot. at 5, most of
 6 these pages come from relatively few documents with lengthy HTML formatting (and little responsive
 7 information). Dkt. 159-25, Ex. 42 at 7 n.8.

8 Nor has Apple withheld its transactional data. Mot. at 2. As Apple has repeatedly explained,
 9 producing 65 billion records is a colossal effort. Dkt. 147-3 at 4. Plaintiffs declined Apple’s offer to
 10 produce the data now and then supplement it at plaintiffs’ expense in the future. So Apple will produce
 11 the data whenever plaintiffs want—but only once. *Id.* Class plaintiffs have instead shifted the
 12 goalposts repeatedly, demanding a new format eight months after serving their request for production,
 13 demanding new data after Apple produced a 100,000 row sample, and then responding with a dozen
 14 new requests after Apple produced, at class plaintiffs’ request, a second sample of 100 million records
 15 (many of which Apple acceded to in an attempt to compromise). *Id.* at 4-5. Class plaintiffs have now
 16 elected to take their uncompromising demands to Magistrate Judge Hixson. *Id.* That is their
 17 prerogative, but they can blame only themselves for holding the data “hostage.” Mot. at 2.

18 **3.** Apple would be harmed by the requested extension. “[O]ur adversarial system . . . is
 19 premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful
 20 statements on both sides of the question.” *Penson v. Ohio*, 488 U.S. 75, 84 (1988). Yet plaintiffs
 21 propose providing the Court with only one-sided briefing before the Court tries the *Epic* case—neither
 22 helpful to the Court nor fair to Apple. The Court ought to get what it asked for: “The *full* scope” of the
 23 relevant issues informed by “*all* of th[e] briefing.” Dkt. 159-25, Ex. 38 at 31:16-32:1 (emphasis added).

24 Plaintiffs’ proposed schedule also would require Apple’s experts to simultaneously prepare
 25 their trial testimony and the opposition to the certification motion. If the Court is inclined to extend
 26 the class certification schedule, it should defer all briefing until after the *Epic* trial concludes.

27 CONCLUSION

28 The class plaintiffs’ motion to modify the class certification schedule should be denied.

1 Dated: November 27, 2020

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3 By: /s/ Mark A. Perry
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